

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPEAL NO. 298 OF 2005**

Adnan Bilal Mulla, age 29 years]
occupation business, resident of]
Borivali, post Padgha, Taluka;]
Bhivandi, District Thane.]
(present in judicial custody] Appellant/
at Thane Central Prison,Thane.)] original
accused no.15.

Versus

The State through D.C.B.,C.I.D.]
Police Head Quarters, Crawford] Respondent/orig.
Market, Mumbai] complainant.

Smt. Nitya Ramkrishnan, Senior Counsel, instructed by
Shri Mubin H. Solkar, Advocate for appellant-accused.
Ms. P.H. Kantharia, A.P.P. for the Respondent-State.

**Coram : N. V. Dabholkar and
Smt. V.K. Tahilramani, JJ**

**Reserved on: 16/02/2006
Pronounced on: 24/02/2006**

Judgment (Per : Dabholkar, J.)

1. This is an appeal under Section 34 of the Prevention of Terrorism Act, 2002 (henceforth, "POTA" for short), challenging the order dated 18.1.2005, delivered by Special Judge under POTA, Mumbai, in bail application No.14 of 2004, arising out of POTA Case No. 2 of 2003, by which learned Judge rejected bail plea of the appellant-accused.

. Although by virtue of section 1(6), POTA is deemed to have come into force on 24th day of October 2001 and was to remain in force for the period of three years from the date of its commencement, i.e. upto 23.10.2004, in view of clause (b) to said sub-section (6) of Section 1, which reads;

" 1(6).....
but its expiry under the operation of this sub-section shall not affect:-

(a).....
(b) any right, privilege, application or liability acquired, accrued, or incurred under this Act, or...",

learned APP has not challenged maintainability of the appeal under Section 34 of the POTA. This is because, the appellant-accused was arrested while the Act was still in force and, therefore, right to seek bail in the light of section 49 and right to appeal, conferred by Section 34 against any order, not being interlocutory order of special court, to High Court, had accrued in favour of the appellant, during the period when the Act

was still in force. Since sub-section (2) of section 34 requires every appeal under sub-section (1) of the said section, to be heard by a bench of two judges of the High Court, present appeal has come up for hearing before us.

2. Having gone through the impugned order, which began with the submissions of two sides, without giving details of the prosecution story, on the basis of which crimes were registered and a charge-sheet was filed before the Special Court, which is registered as POTA Case No. 2 of 2003, we have obtained prosecution story from the learned APP, which she has submitted in writing on 16.2.2006 under the caption "submissions on behalf of the Prosecution". We have taken these submissions on record and marked as Exhibit A for the purpose of identification.

. According to the prosecution, all the accused in this case, those who are arrested, those who are wanted and those who are deceased, hatched a conspiracy to wage war against the State and for that purpose, conspired to commit terrorist acts, such as, bomb blasts and assassinations of prominent Hindu leaders, in places like Mumbai, Pune and other prominent places. In

prosecution of the object of conspiracy, acts of preparing bombs and exploding those, were committed by some of the accused persons, in this case. According to prosecution, materials, such as, sophisticated fire arms, i.e. AK-47 and AK-56 rifles, pistols, explosives and hazardous chemicals, were collected. There were also arrangements for training Muslim youths in operating those sophisticated fire arms and also handling, dismantling and reassembling those, in preparing and exploding bombs.

. According to the prosecution, the present appellant is one of the accused involved in three bomb blast cases. The first one took place on 6.12.2002 at 16.50 hours at Mumbai Central Railway Station in McDonald's Restaurant situated in the main Railway station. In this bomb blast, 25 persons were injured and public property to the tune of Rs.28.00 lacks was damaged. CR. No. 124 of 2002 was registered by Bombay Central Railway Police Station, regarding this incident and eight accused persons were arrested in connection with the same. Subsequently, investigation was transferred to DCB, CID, Mumbai, vide CR No.59 of 2003.

. Second bomb blast of the series was caused on

27.1.2003 at about 20.10 hours in vegetable market at Vile Parle (East). The bomb was kept in a bag hung to a bicycle parked in the vegetable market. As a result of this bomb blast, one woman died and 33 persons were injured. In addition, public property worth Rs.2.00 lacks was damaged. CR. No. 38 of 2003 was registered with Vile Parle Police Station, which was subsequently transferred to DCB, CID, as CR. No.9 of 2003. Eleven persons were arrested in connection with this incident.

. Third bomb blast was caused at Mulund in a Karjat bound Central Railway suburban local train, on 13.3.2003 at 19.56 hours. Eleven commuters died on the spot and 86 were injured, simultaneously causing damage to the public property to the tune of five lacks. Kurla Railway Police Station registered an offence vide CR. No. 52 of 2003 and 16 persons were arrested. This matter was also subsequently transferred to DCB, CID, Mumbai, as CR.No.21 of 2003. It is informed that now, investigation of all three matters is entrusted to a common officer of the rank of ACP.

. Since the prosecution believed that all three bomb blasts were outcome of one conspiracy, with common object to create fear and terror in the minds of common

people and society at large and thus achieve common goal, one charge-sheet was filed, which is registered as POTA Case No.2 of 2003 and totally, 16 arrested persons were produced before the court. It is further added that explosive substance used in two bomb blasts at Vile Parle and Mulund was ammonium nitrate, and gun powder was used at Bombay Central.

3. On reference to the impugned order, it appears that apart from the grounds for release on bail, the contentions were raised regarding illegal detention and non-observance of the guide lines laid down by the Apex Court in the matters of **D.K. Basu v/s State of West Bengal, AIR 1997 S.C. 610** and other judicial pronouncemtns. The learned Special Judge observed that the contentions regarding illegal detention by non observance of the guidelines laid down by the Honourable Apex Court, could be brought to the notice of the court during the course of the trial and those contentions could be considered with appropriate material for the same.

. Special Judge observed that although statements recorded under Section 27 of the Indian Evidence Act, were not admissible against persons other than makers of

the same, evidenciary value of the discovery, pursuant to the discovery statement, cannot be brushed aside. Likelihood of delay in disposal of the case, was held as ground not available for seeking release on bail, by observing that the appellant could insist for expeditious trial. Observing that the material collected during investigation indicated involvement of the appellant in an offence punishable with imprisonment for life, because of grave nature of the accusations, since it was alleged that the appellant had carried AK-47 rifles and he was also instrumental as driver of the jeep for the purpose, of transporting certain persons to Mahuli hill, near Padgha, learned Special Judge held that apprehension of long term imprisonment may impel appellant to avoid the trial or to flee from justice. Learned Special Judge also felt that, probability of appellant tampering with the evidence, if released on bail; could not be ruled out, because all the witnesses are residents of village Padgha. The learned Judge has also taken a note of the fact that appellant-accused is closely related to main accused, who is said to be mastermind of the entire conspiracy. Finding it that grant of bail to the appellant-accused would be risky, bail plea of the appellant is rejected.

4. Heard Ms. Nitya Ramkrishna, learned Counsel for the appellant and Ms. Kantharia, learned APP for the Respondent.

. Referring to Section 49 of POTA, regarding modified application of certain provisions of the Code of Criminal Procedure, 1973, learned Counsel for the appellant submitted that more than one year has lapsed since arrest of the appellant (which fact is not disputed by learned APP) and hence, limitations prescribed by sub-sections (6) and (7) of said Section 49, are not applicable to the present case. For the purpose of supporting the proposition, she has placed reliance upon ratio laid down by Hon'ble the Supreme Court in the matter of **Peoples Union for Civil Liberties vs. Union of India, 2004 (9) S.C.C. 580** and more particularly the contents in paragraphs 68 to 70, which reads as follows;-

" 68. **Proviso to Section 49(7) reads as under:**

" Provided that after the expiry of a period of one year from the date of detention of the accused for an offence under this Act, the provisions of sub-section (6) of this section shall

apply. "

69. It is contended that this proviso to Section 49(7) of POTA is read by some of the courts as a restriction on exercise of power for grant of bail under Section 49(6) of POTA and such power could be exercised only after the expiry of the period of one year from the date of detention of the accused for offences under POTA. If the intention of the legislature is that an application for bail cannot be made prior to expiry of one year after detention for offences under POTA, it would have been clearly spelt out in that manner in Section 49(6) itself. Sections 49(6) and 49(7) of POTA have to be read together and the combined reading of these two sections is to the effect that the Public Prosecutor has to be given an opportunity of being heard before releasing the accused on bail and if he opposes the application, the court will have to be satisfied that there are grounds for believing that he is not guilty of having committed such offence. It is by way of exception to Section 49(7) that the proviso is added which means that after the expiry of one

year after the detention of the accused for offences under POTA, the accused can be released on bail after hearing the Public Prosecutor under ordinary law without applying the rigour of Section 49(7) of POTA. It also means that the accused can approach the court for bail subject to conditions of Section 49(7) of POTA within a period of one year after the detention for offence under POTA.

70. Proviso to Section 49(7) provides that the condition enumerated in sub-section (6) will apply after the expiry of one year. There appears to be an accidental omission or mistake of not including the word "not" after the word "shall" and before the word "apply". Unless such a word is included, the provision will lead to an absurdity or become meaningless. Even otherwise, read appropriately, the meaning of the provision to Section 49(7) is that an accused can resort to ordinary bail procedure under the Code after that period of one year. At the same time, the proviso does not prevent such an accused to approach the court for bail in accordance with the provisions of POTA under

Sections 49(6) and (7) thereof. **This interpretation is not disputed by the learned Attorney General.** Taking into account the complexities of terrorism-related offences and intention of Parliament in enacting a special law for its prevention, we do not think that the additional conditions regarding bail under POTA are unreasonable. We uphold the validity of Section 49." (emphasis added)

. Thus, according to the learned Counsel, the restrictions provided by modified application of the provisions of the Cr. P.C., and more particularly that of bail, after expiry of one year since initial arrest, the appellant-accused is not required to satisfy parameters, as prescribed by sub-section (7) of Section 49 of POTA i.e. "the Court is satisfied that there are grounds for believing that he is not guilty of committing such offence." In spite of this, it was submitted that the appeal would still be argued, as if the restrictions are applicable.

. While arguing on merits of bail plea, learned counsel has placed reliance on the observations of the Supreme Court in the matter of **Ranjitsing Brahmajeetsing**

Sharma v. State of Maharashtra, 2005, AIR SCW 2215, as contained in paragraph 49 and the portion relied upon by learned counsel, reads as follows;-

" We are furthermore of the opinion that the restrictions on the power of the Court to grant bail should not be pushed too far. If the Court, having regard to the materials brought on record, is satisfied that in all probability he may not be ultimately convicted, an order granting bail may be passed. The satisfaction of the Court as regards his likelihood of not committing an offence while on bail must be construed to mean an offence under the Act and not any offence whatsoever be it a minor or major offence. If such an expansive meaning is given, even likelihood of commission of an offence under Section 279 of the Indian Penal Code may debar the Court from releasing the accused on bail. A statute, it is trite, should not be interpreted in such a manner as would lead to absurdity. **What would further be necessary on the part of the Court is to see the culpability of the accused and his involvement in the commission of an organised crime either**

directly or indirectly. The Court at the time of considering the application for grant of bail shall consider the question from the angle as to whether he was possessed of the requisite mens rea." (emphasis added)

While making the observations as above, the Hon'ble Apex Court was dealing with section 21(4), regarding restrictions on bail, as contained in Maharashtra Control of Organised Crime Act ("MCOCA" for short). Learned Counsel did not fail to point out that these observations in the matter of Ranjitsing (supra), were referred with approval by the Apex Court in the matter of Vasanthi v. State of A.P., (2005) 5 S.C.C 132.

. The learned Counsel has laid emphasis on the portion of the observations underlined in the quotation hereinabove. She submitted that while considering application for bail, this court will have to consider the question, as to whether, upon considering all the material placed before court, the prosecution demonstrates that the applicant possessed requisite mens rea. It was submitted that the appellant himself has not made any confession under Section 32 of POTA and confessions of co-accused recorded under the said

provisions of POTA, are not admissible as against the appellant. Thus, confessional statement of co-accused under Section 32 of POTA, is inadmissible piece of evidence against present appellant. This court will not be in a position to take said material into account for arriving at a conclusion that the appellant possessed requisite mens rea.

. The observations of the Hon'ble Supreme Court in the matter of State (N.C.T. of Delhi) v/s Navjot Sandhu, 2005 AIR SCW 4148, as contained in paragraph 10, were relied upon by the learned Counsel for supporting such an argument. While dealing with interpretation of Section 32(1) of POTA, which makes confession made to a high ranking police officer, admissible in the trial, of such person for offence under the said Act, shall also be admissible as against co-accused, the Supreme Court observed thus;

" We are, therefore, of the view that having regard to all these weighty considerations, the confession of a co-accused ought not be brought within the sweep of Section 32(1). As a corollary, it follows that the confession of the 1st and 2nd accused in this case recorded by the

police officer under Section 32(1), are of no avail against the co-accused or against each other. We also agree with the High Court that such confessions cannot be taken into consideration by the Court under Section 30 of the Indian Evidence Act. The reason is that the confession made to a police officer or the confession made while a person is in police custody, cannot be proved against such person, not to speak of the co-accused, in view of the mandate of Sections 25 and 26 of the Evidence Act. If there is a confession which qualifies for proof in accordance with the provisions of Evidence Act, then of course, the said confession could be considered against the co-accused facing trial under POTA. But, this is not the case here." (emphasis added)

. Thus, according to learned Counsel, in case, the prosecution has any inclination to rely upon confession of co-accused, as recorded under Section 32(1) of POTA, the same is not admissible against present appellant.

. Since there are statements of witnesses recorded, either under Section 161, or under Section 164

(before a Magistrate), learned Counsel for the appellant has taken us through the statement of one such witness recorded on 21.10.2003. She tried to demonstrate that the witnesses deposing against the appellant herein, are the persons to whom the appellant had driven to Mahuli hills and thus they are the persons, who had participated in the alleged training. According to learned Counsel, in the light of section 319 of the Code of Criminal Procedure, these witnesses will have to be impleaded as co-accused by the Special Court and thereafter their statements will not carry character as deposition of a witness. Thus, according to learned Counsel, the statements of other witnesses would also be material, inadmissible at the trial. She has placed reliance on observations of the Hon'ble Apex Court in the matter of Swill Ltd. vs. State of Delhi and another, (2001) 6 S.C.C. 670, in order to strengthen her argument that the special court will have no option but to implead these witnesses as co-accused. In fact, the portion relied upon by her from paragraph 6 of the reported judgment, are the observations of the Supreme Court in the matter of Raghubans Dubey v. State of Bihar, AIR 1967 SC 1167, which read as follows;

" In our opinion, once cognizance has been taken

by the Magistrate, he takes cognizance of an offence and not the offenders; once he takes cognizance of an offence it is his duty to find out who the offenders really are and once he comes to the conclusion that apart from the persons sent up by the police some other persons are involved, it is his duty to proceed against those persons. The summoning of the additional accused is a part of the proceeding initiated by his taking cognizance of an offence."

. According to learned Counsel, even if the material that is inadmissible is taken into consideration, that shows that on one occasion, the appellant carried a box, which is said to contain AK-47 rifle, and on another occasion, he is said to have reached some persons at the foot of Mahuli hill, allegedly for the purpose of undergoing training. Even if these allegations are taken on their face value, according to learned counsel; the prosecution is trying to attribute mens rea to the appellant without knowledge, the prosecution does not have any evidence to connect the appellant with the bomb blast. The learned Counsel placed reliance upon paragraph 154 to 162 in the matter of Navjot (supra) and Naleeni's case reported at

1999 SCC (Cri.) 691 (para 610), and urged that the circumstances relied upon against the accused persons in those cases were much more serious than the appellant before this Court and yet, they were not held to be conspirators. Hence, according to learned counsel, the prosecution does not have material sufficient to demonstrate that the appellant herein was a part and parcel of the conspiracy, having agreed to the common object of the same. She has placed reliance upon the observations of the Supreme Court in the matter of Kehar Sing v/s State (Delhi Administration), (1988) 3 SCC.609, as contained in paragraphs 274 and 276, which read as follows;

" 274. It will be thus seen that the most important ingredient of the offence of conspiracy is the agreement between two or more persons to do an illegal act. The illegal act may or may not be done in pursuance of agreement, but the very agreement is an offence and is punishable. Reference to Section 120-A and 120-B IPC would make these aspects clear beyond doubt. Entering into an agreement by two or more persons to do an illegal act or legal act by illegal means is the very quintessence of

the offence of conspiracy."

276.

The concurrence cannot be inferred by a group of irrelevant facts artfully arranged so as to give an appearance of coherence. The innocuous, innocent or inadvertent events and incidents should nor enter the judicial verdict. We must thus be strictly on our guard. "

. As a last limb of her argument, learned Counsel for the appellant has drawn our attention to unreported judgment dated 19.12.2005, delivered by another Division Bench of this High Court in Criminal Appeal No.56 of 2005 (Aatif Nasir Mulla v/s State), by which this court has upheld the bail plea of appellant therein, another accused in this very case. It was urged that the allegations levelled against that appellant were more serious, since it was the claim that there was also recovery of AK-56 rifles. Therefore, on the ground of parity, according to learned counsel; the present appellant should be considered for grant of bail.

5. Replying the arguments, learned APP Ms.

Kantharia submitted that, although there were only three incidents of bomb blast, it would be misconception to believe that the conspiracy was only for the purpose of carrying out these three bomb blasts. At the most, three bomb blasts, was one of the activities of the conspiracy, which is aimed at waging war against the State and Government established in accordance with law and Constitution. She has expressed that, the ambit and magnitude of the conspiracy being much large, can be demonstrated by the material on record. According to her, the object of the conspiracy is not of committing a trifling offence against any individual, or to do some legal acts by illegal means, but the activities of the conspiracy are aimed at, installing fear and terror in the mind of individuals and the society at large. This is an attempt to wage war against the Government, which is attempted to be accomplished by violence of a public nature. She desired us to consider seriousness of the case, as against the appellant in the light of outer limits or magnitude of the conspiracy, although his role in the same may be limited. She also placed reliance upon observations of the Supreme Court in the matter of Kehar sing (**supra**) from paragraph 271, which, in fact is a passage from '**Russel on Crime**' and which is reproduced by the Hon'ble Apex Court in said paragraph 271, which

reads ;

" The gist of the offence of conspiracy then lies, not in doing the act, or effecting the purpose for which the conspiracy is formed, nor in attempting to do them, nor in inciting others to do them, but in the forming of the scheme or agreement between the parties. Agreement is essential. Mere knowledge, or even discussion, of the plan is not, per se, enough. "

It was the submission of learned APP that, it is not necessary to prove the extent of physical participation, once it is demonstrated that the appellant is a party to the agreement for conspiracy. Sharing of thought is sufficient to be a member of the conspiracy. According to learned APP, the prosecution has evidence against the appellant in the form of statements of five witnesses recorded under Section 161 of Cr.P.C., of six witnesses, whose statements are recorded under Section 164 before Magistrate and confessional statements of two accused persons recorded under Section 32 of POTA. According to her, these statements together contain sufficient material to demonstrate that the appellant is a part and parcel of the conspiracy, by agreement. He is not

impleaded by the prosecution in the absence of his knowledge about conspiracy. On the contrary, he has knowledge and he has shared the intentions. She has provided copies of eleven statements. Out of these eleven, serial numbers 3 and 11 are the confessions recorded under Section 32(1) of POTA and serial Nos. 1, 2 and 4 to 10 are the statements recorded either under Section 161 or 164 of Cr.P.C.1973. These statements are marked by us for convenient reference as PW-1, 2 and 4 to 10. Out of those, statements of PWs. 6 and 7 are recorded twice under both the provisions i.e. 161 and 164 of the Cr.P.C. Learned APP did not dispute the proposition of learned counsel for the appellant that, confessions recorded under Section 32 of POTA are not admissible, as against co-accused, as laid down by the Supreme Court in the case of Navjot (supra). However, she added that, the prosecution cannot be deprived of the use of the said confession for the purpose of demonstrating the horizons of the conspiracy. The portions from these statements relied upon by learned APP, in order to impute knowledge and comity of intentions of the appellant, shall be discussed at a later stage.

. According to learned APP, comparison of

allegations against accused persons, who were held not to be conspirators in the matter of Navjyot and Naleeni, as done by learned Counsel for the appellant, cannot be taken into consideration. This is because, the conclusions of the court referred therein are arrived at after full-fledge trial and after the witnesses were subjected to cross examination. The material, at the stage of considering the bail plea, will have to be considered on its face value and without any deduction.

. So far as contention of the learned Counsel for the appellant that the witnesses, who are relied upon by the prosecution, are liable to be impleaded as accused persons, is concerned, it was submitted that the court, at the stage of considering bail plea of present appellant, need not take into consideration such a contingency. The trial court may or may not be inclined to implead them as co-accused persons. As submitted by learned counsel for the appellant, there is at least one legal way of the statements of these persons, even if they are impleaded as accused persons, by using power under Section 319 of Cr.P.C., coming on record as evidence. If this Court is inclined to consider contingent events of impleading these deponents as accused persons at this stage, a possibility may not be

ruled out that they may turn approver, as the role attributed to them is comparatively much inferior.

6. Referring to unreported judgment of this Court in Criminal Appeal No. 56 of 2005, delivered on 19.12.2005 (Aatif Nasir Mulla vs. State of Maharashtra), it was submitted by learned counsel for the appellant that the appellant is entitled to bail on the ground of parity. This is because the co-accused involved in this very case, is enlarged by this court on bail. There need not be quarrel over the legal proposition that in case one of the accused persons facing equally serious allegations, is enlarged on bail, other ordinarily, should be entitled to bail. However, we cannot ignore the two contingencies, when a co-accused may not be entitled to bail, although one of them is already enlarged.

. Firstly, if there is a variation in the degree of seriousness of allegations, which in other words, would mean that the principle of parity would be totally inapplicable, and secondly, even in case where the allegations against the co-accused, are of the same degree of seriousness, the courts may be required to distinguish their case while considering plea for bail.

While considering bail plea, the courts ordinarily, consider two issues. One, whether there is a prima facie case, indicating a possibility of conviction of the accused for a long term imprisonment, such as, life imprisonment, and secondly, whether the accused is likely to cause obstruction in the administration of justice, either by absconding and thus making himself unavailable for the trial, or by hampering the course of justice by tampering the prosecution evidence. In simple words, if one of the two accused, is influentially positioned, capable of making his escape from the trial or dominating the witnesses, the court may be required to reject his bail plea, although such a plea by other accused facing equally serious allegation, is upheld.

. In criminal appeal No.56 of 2005, the prosecution had relied upon grounds to claim that the appellant therein was a member of criminal conspiracy. It was alleged that there was discovery of AK-56 rifle at the instance of the appellant and he had also taken part in training terrorists to use AK-56 rifle. It was also pleaded that the appellant had given shelter to a Pakistani citizen. After considering the material placed before it, the court arrived at a conclusion that

excepting recovery of AK-56 rifle, the prosecution has no evidence to connect the accused-appellant with the crime. In spite of considering the links putforth by the prosecution to demonstrate involvement of the appellant in conspiracy, the court arrived at a conclusion that those were not sufficient to hold that he was member of the conspiracy, or he had knowledge of conspiracy. (para 26 of the judgment).

. Earlier, in paragraph 25, the court also observed that newspaper report in Mid-day daily, dated 3.5.2003, created some doubts about recovery, claimed to be at the instance of that appellant on 3.5.2003 between 5.50 a.m. to 9.30 a.m., although court hastened to add that, it was only prima facie observation. The court was of the view that the Public Prosecutor could not demonstrate that any trainees were trained by the appellant in the camps held for the purpose (paragraph 13 of the judgment).

. Regarding giving shelter to Pakistani citizen, the prosecution relied upon confessional statement of one Anwar Ali-co-accused. After considering the said statement, the court arrived at a conclusion that the appellant-accused had no knowledge about the conspiracy,

had no knowledge about the antecedents and activities of the Pakistani national Irfan.

. Thus, practically coming to the conclusion that the appellant therein had no knowledge of conspiracy while giving shelter to Pakistani citizen, that there was no evidence to show that the appellant had trained some terrorists in using AK-56 rifle and that the recovery at the instance of the appellant was doubtful, other bench of this court was inclined to consider bail plea of the appellant therein, favourably.

. If this is taken into account, reliance on the earlier decision was not necessary. In case, we arrive at a conclusion that no prima facie case is made out against present appellant, he would be entitled to bail without reference to decision in criminal appeal No. 56 of 2005. It may also be taken into account that the allegations against present appellant are different. He is alleged to have transported the weapons to the training centre and also carried some trainees to the training centre. Whether this amounted to overtacts contributing to the common object of the conspiracy with knowledge about the same, would be an aspect to be considered in the present matter and in case, we arrive

at an affirmative finding, the decision in earlier appeal

would again be of no assistance.

. For the reasons discussed hereinabove, we are of a considered view that the principle of parity may not come into play as fast as it ordinarily comes in the cases of criminal conspiracy, in the cases of offences against human body, or affecting life.

7. In fact, it may not be inappropriate to say that conspiracies for commission of offences under Chapter VI of IPC i.e. offences against State, or even offences under Chapters VII and VIII, relating to the Army, Navy and Air force and against public tranquillity, cannot be treated on the same footing as conspiracy for commission of offences under Chapter XVI and XVII. Conspiracy of the second type ordinarily would have very limited purpose and also very limited consequences. As against this, conspiracies of the first type are bound to have unlimited purpose, unlimited overtacts and unlimited consequences. The courts, therefore, will have to be slow in accepting the analogy of the judicial decisions of the cases of second type of conspiracies, in the

cases of first type of conspiracies.

8. Regarding admissibility of Confessional Statement under Section 32 of POTA, against co-accused.

By virtue of ratio laid down by the Supreme Court in para 10 of Navjot Sandhu's case, confessional statement recorded under section 32 of POTA, cannot be taken into consideration by the court against co-accused, even under Section 30 of the Indian Evidence Act. Yet, in the same paragraph, at page 4198 (of 2005 AIR SCW 4148), the Supreme Court observed and we quote, at the cost of repetition:

" If there is a confession, which qualifies for proof in accordance with the provisions of Evidence Act, then of course the said confession could be considered against co-accused facing trial under POTA. "

. In the light of these observations, learned APP was justified in submitting that the prosecution shall be well within its limits of the Evidence Act, in claiming that the confessional statements of the accused persons recorded under Section 164 of Cr.P.C., before a Magistrate, in case those qualify the test of

admissibility under Section 30 of the Evidence Act, would be available for use against co-accused.

. While conceding that the confessional statement under Section 32(1) of POTA would not be admissible against co-accused, it was submitted by learned APP that the same will still be available for the prosecution to demonstrate to the court, dimensions and magnitude of conspiracy.

. In paragraph 11 of the judgment in the matter of Navjot (supra), the Hon'ble Apex Court also considered impact of section 10 of evidence Act, on confessional statement of accused under Section 32(1) of POTA. After taking a note of analysis of section 10, as done in the matter of Kehar Sing, 1988 (3) SCC 609, the Apex Court referred to the decision of Privy Council in the matter of Mirza Akbar vs. King Emperor, AIR 1940, P.C., 176, in which distinction was drawn between the communications between conspirators while conspiracy was going on with reference to carrying out it and statements made, after arrest or after conspiracy has ended, by way of description of events then past. Issue regarding admissibility of confessional statement under Section 32(1) of POTA, by support of section 10 of the

Evidence Act, was concluded thus, by observing at page 4205.

" The law is thus well settled that the statements made by the conspirators after their arrest cannot be brought within the ambit of section 10 of the Evidence Act, because by that time the conspiracy would have ended. If so, the statement forming part of confessional statement made to police officer under Section 32(1) of POTA, cannot be pressed into service by prosecution against other accused." (page 4205).

Since the confessional statements under Section 32(1) of POTA are recorded before a high ranking police officer, it presupposes arrest of the accused and arrest presupposes end of the conspiracy and, therefore, confessional statements under Section 32(1) were held inadmissible even after considering Section 10 of the Evidence Act.

. The argument of learned senior Counsel Mr. Gopal Subramaniam that the view taken by the Privy Council runs counter to the language of Section 10, and

that the exclusion of post arrest statements of the conspirators, is not warranted in the language employed in Section 10 and it makes section 10 nugatory, was dealt with thus;

" Though, in our view, the Section can still play its role, we find some force in this contention. But, it is not open to us to upset the view reiterated in a long line of decisions." (page 4206).

9. The moot question that we are tempted to ask ourselves is that, whether a confessional statement by a conspirator after his arrest (such as, confession under Section 32(1) of POTA), can be brought within the ambit of Section 10 of the Evidence Act, and thus be admissible against co-accused, if the conspiracy still continues to wave its tentacles.? For example, if arrested mastermind of a conspiracy makes a confessional statement that the provision is made for his substitute, in case of his death or arrest and names the substitute, who has taken over, will such statement be admissible by impact of Section 10 of the Evidence Act, upon section 32(1) of POTA, or will it be inadmissible, because the statement is made while he is under arrest ?. If the

outer time limit for admissibility of confession by co-accused under Section 10 is termination of the conspiracy, in the given illustration, his statement would be admissible, even if the maker is arrested, but because conspiracy has continued. This is because, Section 10 makes no reference to the arrest of conspirator.

. Coming back to the proposition of learned APP, we find no hesitation to accept the same. The confessional statement of the co-accused would certainly be available to the prosecution to demonstrate the nature and magnitude of the conspiracy, although the same may not be available to be used for establishing, either that the co-accused is also a conspirator, or for the purpose of establishing the role of co-accused (not the maker of the statement.). The prosecution will have to link the co-accused with the conspiracy, by other material and then a possibility cannot be ruled out that seriousness of the conspiracy, as established by confessional statement of co-accused, although may not directly affect the other, may indirectly affect him on merits at the end of the trial, on the basis of proof of his being conspirator and his role in it, by other material.

10. We find ourselves in agreement with the submissions of the learned APP that it will be premature to judge, whether each and every deponent, relied upon by the prosecution, whose statement is recorded either under Section 161 or Section 164 of Cr.P.C., would be liable to be impleaded as co-accused. This is because, if he is liable to be impleaded as co-accused and that contingency is to be taken into account at so early a stage, possibility of his turning accomplice, also cannot be ignored. By the discussion hereinabove, and more particularly in the light of observations of the Supreme Court in para 10 of Navjot's case (page 4198 of 2005 AIR SCW 4148), confessional statement of the accused, if recorded under Section 164 of Cr.P.C., 1973, before a Magistrate and thus free from vice, as referred under Sections 24 to 26 of the Evidence Act, would also be admissible piece of evidence. The contention that the witnesses are liable to be impleaded as co-accused under Section 319 of Cr.P.C., therefore, is not relevant at this stage.

11. Now on, we intend to consider the material from the statements of the witnesses, as recorded under Sections 161 and 164 of Cr.P.C. i.e. the statements of

deponents marked as PWS.1, 2 and 4 to 10. The statements of deponents marked as serial Nos. 3 and 11 are confessional statements of co-accused Noor Mohammed @ Sikandar @ Imam and Anwar Ali respectively, recorded under Section 32 of POTA, before Deputy Commissioner of Police, Zone XII and Deputy Commissioner of Police, Zone I, respectively. The material, which we may consider to find out the strength of the prosecution case, as against the appellant, would be the material admissible in accordance with the provisions of law. Keeping in harmony with our observations in paragraph 9 above, we shall be referring to confessional statements of Noor Mohammed and Anwar Ali only for the limited purpose of apprising ourselves of the nature and magnitude of the conspiracy.

12. We have gone through the confessional statement of Noor Mohammad @ Imam @ Sikandar. Apparently, this appears to have been recorded after giving time for reflexion, of about 46 hours. We do not intend to reproduce any portions of the statement, but we intend to refer to gist of that part of the statement, which demonstrates the nature, magnitude and reach of the activities of the accused persons and consequently, that of the conspiracy. It appears that in the year 1991, he

had attended a large scale meeting of **SIMI** (Students' Islamic Movement of India) held at Bandra Reclamation ground. The meeting was attended by extremists from various nations i.e. India, Bangla Desh, Iran and Palestine. The meeting continued for three days and Noor Mohammed attended it on all the three days. In the meeting, one C.M. Bashir, resident of Chennai, delivered a provocative speech on the subject of atrocities on Kashmiri Muslims. At that time, Saquib Nachan (accused No.1 in the present case) was the General Secretary of SIMI in India. He also delivered provocative speeches and Noor Mohammed felt inspired by his speeches. In the said meeting, he was introduced to Riyaz Bhatkal and Asif Raza. Asif was the resident of Calcutta and during the meetings of SIMI, atrocities on Muslims in Palestine and Bosnia were also discussed. Asif Raza had asked Riyaz to identify the workers of SIMI, who were prepared for **Jehad** and while doing so, had also informed that such identified extremists prepared for **Jehad** could be trained through **ISI** in Pakistan. In August 2000, Noor Mohammed was sent to Calcutta, by Howrah Express. From there, he was taken up to Bangla Desh border, by bus and by another bus, he was taken to Dhaka, Bangla Desh. In Dhaka, for some days, Noor Mohammed and his companion stayed with one

Iqbal, who was Pakistani citizen and who had shifted his wife and two children to Myanmar. By pretending that their passports were lost, new passports were prepared, presumably from Pakistan Embassy From Bangla Desh, he was transported to Karachi, by air. By a bus, Noor Mohammed was transported to training camp in Pak occupied Kashmir (PoK), which was run by Lashkar-e-Tayyaba (LeT) and he has undergone a rigorous training at the said camp, for couple of weeks. After a gap of three days, he was shifted to another training camp, 60 kilometers from Bahawalpur, in a desert. The daily routine of this camp given by Noor Mohammed indicates that, the training period was of five hours from 8.00 a.m. to 12.00 noon and 3.00 p.m. to 4.00 p.m. During the training, there were conscientious efforts to prepare them for Jihad. This training camp continued for three months, which was intermittently visited by an officer of the rank of Major from Pakistani Armed Forces. What Noor Mohammed says hereinafter, was the purpose of this training;

i.e. " Purpose of this training was was to assassinate Hindu leaders in India and to unsettle the Govt. by causing bomb blasts in major cities like Bombay and Calcutta, thereby causing loss of life and property and thus disturb social order.

. After conclusion of the training, trainees were brought back to Bahawalpur office of LeT. Asif again arranged for visa through Nepal Embassy. From Karachi, he was flown to Nepal, then by a bus and by motorcycle, he was dropped at India-Nepal border, where he picked up bus for Patna and thereafter he travelled to Calcutta, by a train. He was provided cash by said Asif through Riyaz. He was provided ammunition, while at Malegaon. Sometime in January-February 2002, Saquib had contacted him on phone and during discussion, at the place of Saquib's brother, he was given assignment of assassination of Hindu leaders. On one occasion, Saquib had directed him to place an order for preparation of 300 bombs. At the directions of Saquib Nachan, he had

trained Muslim youths in using fire arms on two occasions at Mahuli hill and on third occasion, at Karwa mountain. He had also given training, regarding preparation of bombs. In one batch, Saquib Nachan himself had undergone the training.

. Without using confessional statement for attributing knowledge, intention, or mens rea to any of the co - accused, including Saquib, statement of Noor Mohammed can be read to find out the extent or magnitude of the training programmes at Mahuli hill, Padgha. It could not have been mere coincident that Noor Mohammed was selected as a trainer. Selection of Noor Mohammed as a trainer, is a reasonable ground for drawing an inference that the training centre at Mahuli hill, Padgha, must be in regular touch with the parent training centre, where the trainer Noor was trained.

13. Confessional statement of Anwar Ali shows that he had completed his post graduation in Commerce faculty in 1988. He attended various SIMI programmes and thus he came in contact with accused No.1 Saquib. He was required to retire from SIMI on attaining upper age limit of 30 years. After completing M.A. in Urdu in the year 1992, he got a job of lecturer at N.D.A. Pune

in March, 1996, as teacher in Urdu. He has confessed to have undergone training of using revolver (pistol) at the suggestion of Saquib and the trainer was Imam @ Sikandar @ Nooruddin. As was conveyed by Saquib, such training was essential, so that the enemies of Islam could be killed. He was also asked by Saquib to identify probable targets. They were also sent for training at Padgha, after travelling upto Kalyan by train and he was in a batch of about 8-10 persons, who were trained in use of AK-56 rifle, again by Imam @ Sikandar @ Nooruddin for couple of hours. It appears from his narration that, his residence was utilised for harbouring a Pakistani national Irfan. After getting a hint that he was required by Mumbai police for interrogation, he himself had surrendered to Mumbai Crime Branch office.

. The confessional statement of Anwar Ali enables us to draw two inferences. One, Padgha is a centre active in identifying the persons, who can be trained. It is also active in identifying the targets, whose killings can cause panic in the society. His confession is sufficient to demonstrate that three bomb blasts at Bombay Central, Vile Parle and Mulund bound local train, was not the only purpose of conspiracy.

14. Now on, we intend to refer to the statements of the witnesses, as recorded either under Section 164 of Cr.P.C. before Magistrate, or under Section 161 of the Code, by the Investigating agency. We have also made clear that it is premature and hence, irrelevant, to consider whether any of the deponents is likely to be impleaded as co-accused, by use of Section 319 Cr.P.C. Therefore, for the present, we are considering the statements on their face value. (We will not be in a position to refer to the names and addresses of the witnesses kept concealed by the prosecution, may be for the purpose of safety and security of the witnesses)

. The first witness, whose statement under Section 164 of Cr.P.C. was recorded on 21.10.2003, narrates that during Namaz at local mosque, he came into contact of Saquib and also Adnan, the appellant herein. After reasonable acquaintance, Saquib seems to have discussed with him issues, such as, miserable position of Muslims in India, Babri mosque, atrocities of army on Kashmiri Muslims etc. Ultimately, in April 2002, Saquib persuaded him to undergo the training programme at Mahuli hill and he was also urged to bring his close friends for the training, who were ready to die for Islam. He was specifically told that Adnan (appellant) would pick him up from his residence in Armada jeep, on the training day. According to him, Adnan, took him in Armada jeep, from his residence along with few others and they were dropped at the foot of Mahuli hill and after completion of training and a night halt, when they climbed down the hill, Adnan was ready with his Armada jeep, to drive them back to their residences. He was used as a custodian of iron box of the size of a video cassette, which he was informed, could be converted into a bomb. It appears that, he was asked to participate in a plan of indiscriminate firing at the people visiting a famous temple in Bombay, sometime in March, 2003, which he refused. The plan could never be executed because of

arrest of accused No.1.

. Statement of the second witness relied upon by learned APP, is recorded by the Investigating Officer on 9.5.2003. He is a pious Namazee, offering five prayers daily since his childhood. According to him, after the Namaz, Saquib Nachan (accused No.1) used to describe to young Muslim boys about demolition of Babri mosque, carnage of Muslims in Gujarat etc. He impressed upon them that Hindu youths were being imparted training in use of different weapons and, therefore, Muslims should also be prepared for getting similarly trained. In or around February-April, 2002, the witness was successfully persuaded to undergo training. It appears that he was one of those, who were transported by the appellant Adnan, in his Armada jeep, to Mahuli hill. He states;

" Adnan Mulla took us to Mahuli hills situated near Shahapur. At that time, Adnan informed us that Farhan and some other boys will meet us on the top of Mahuli hill for training. Therefore, we should climb Mahuli hill. thereafter Adnan took jeep and went away."

According to this deponent, at the top of the Mahuli hill, he met Farhan and also 4-5 unknown persons with him.

. Learned Counsel for the appellant, by relying upon the judicial pronouncements, has submitted that unless knowledge can be imputed to the appellant, he cannot be termed as member of the conspiracy. The statement of present deponent, clearly indicates that although the appellant reached the trainees only at the foot of hillock, yet, he was aware as to whom these trainees will meet, when they reach at the top of the hill. If at all we have to consider probability and natural course of human conduct, the visitors to the hill for the purpose of picnic and visitors for the purpose of training can certainly be distinguished and more easily. People in picnic mood would not travel quietly. There would be laughter, singing, smoking and even consumption of alcohol, may be at the cost of limited aberration. In the evening, this witness was reached back to Borivali, from Mahuli hill.

. The statements of deponents No. 4 and 5 are

recorded in vernacular and on the same day i.e. 25.6.2003, they seem to have been taken to Mahuli hill about an year prior to the recording of their statements. In fact, they were not taken for the purpose of training, but their services were used for carrying luggage to the fort at the top of Mahuli hills and immediately on reaching the top, they were paid Rs.100/=-, biscuits and were directed to leave immediately.

. From the statements of first and second witnesses, it is evident that, they attended the training at different times, because, according to first witness, his batch had night halted and only on the next morning, they all were reached to their residences. According to second witness, they had climbed down the hill on the same evening and were reached home by the same vehicle. The two statements, therefore, attributed responsibility on Adnan (appellant) of carrying passengers for training on two occasions.

. The statements dated 21.10.2003 of witnesses marked as serial Nos.6 and 7 are recorded under Section 164 of Cr.P.C.before a Magistrate. It appears that these two persons were taken for training at Mahuli

hill, by pretending that they were being taken for picnic. The first one had, immediately after training, expressed his anger and his resentment to the person, who had brought them to the location under the pretext of picnic and the second one seems to have taken ill, while proceeding towards centre and had returned without training.

. The witnesses marked as serial No. 8 and 9, whose statements are recorded under Section 164, talked about the story of appellant having delivered a big black bag to accused No. 1 Saquib Nachan. According to the prosecution, this contained weapons.

. The statement of 10th witness was also recorded under Section 164 before the Metropolitan Magistrate. It seems that, he was brought from Pune upto Kalyan by train and thereafter taken to training centre at Mahuli hills. After the training, one Anwar Ali (presumably confessing accused) kept in touch with him and his services were tried to be utilised for identifying the target for assassination. He seems to have, in stead of assisting, deliberately misguided the said Anwar Ali.

15. If we are to sum up the material available, it

can be said that, without reading any material from the confessional statement as against accused, but reading the same for the purpose of judging expansion of the conspiracy, it can be seen that the training centre at Mahuli hills, Padgha, was in touch with the training centre beyond the borders of the nation. It could procure services of the trainer, who was trained in PoK by LeT. There appears to be an attempt to secure trainees from all over. The trainees are being psychologically prepared for Jihad. For the purpose, accused had discussions with these people, immediately after Namaz at local mosque and he was having dialogue sufficient to inject hatred in the minds of the listeners, against non-muslims and Indian army.

. So far as present appellant is concerned, from the statement of witness, marked as PW No.2, it is clear that, he was not only a hired taxi, but he knew that the the passengers delivered by him at the foot of Mahuli hills, were being taken there for training. He also knew as to who was going to meet them at the top of the hill. This is clear sign of the fact that the appellant had knowledge of the activities on the top of the hill, probably without going there. His meticulous attendance to pick up trainees, either from their residences, or

from Kalyan railway station, or from the bottom of Mahuli hills for return journey, rules out a possibility of his being a mere hired taxi. The evidence on record indicates at least two trips by him for trainees and one trip for delivery of some luggage. He seems to be active for all types of transport for the training centre. There is reference to his presence in the statement dated 21.10.2003 of the witness marked as PW-1, along with accused No. 1 Saquib, Farhan, named as trainers by PW-2, at the time of Namaz at the local mosque and it is the statement of the witness that immediately after this prayer, accused No. 1 Saquib used to deliver his thoughts, pumping hatred against non-muslims.

. We feel that, there is sufficient material on record to infer that what we are seeing with the material on record, is tip of the iceberg of the larger plan and the appellant is not a mere hired taxi, but is active worker with thorough knowledge of the activities.

16. The conspiracy is always hatched in secrecy and it is impossible to adduce direct evidence of the same. The offence can only be proved largely from the inference drawn from the acts or illegal omissions

committed by the conspirators in pursuance of the common design.

. It is also settled legal position that in a conspiracy to commit an offence, the agreement itself

becomes the offence and no overtact is necessary in such a case. But, the proof of overtacts goes a long way to establish that the agreement was, in fact, made by the parties and that the acts were not unconnected and isolated but were committed in pursuance of the agreement.

. The conspiracy with smallest object, such as, killing of an individual, also would be hatched in absolute secrecy. We may not, therefore, be at an error to presume that the conspiracy, such as, the one under consideration, the roots of which can be traced beyond the borders of the country, would be hatched in greater secrecy.

. So far as the issue regarding knowledge of the object of conspiracy to the appellant herein and his agreement to participate for the purpose is concerned, the same therefore, will have to be inferred from his conduct and surrounding circumstances. We have already demonstrated that, he was in the group attending Namaz at local mosque with accused No. 1, where accused No. 1, immediately after Namaz, used to express his thoughts to group of young persons. It cannot be presumed that the appellant was staying away, when Saquib discussed

his thoughts with Muslim youths, in order to persuade them for undergoing training, so that they can be prepared for Jihad. The small piece of evidence, which indicates that he had knowledge as to who was the trainer, is sufficient to draw an inference that he was aware of the nature of activities and the purpose. That he is brother-in-law of accused No.1, puts him into more disadvantageous position. We feel that the material is sufficient at this prima facie stage, to believe that the appellant was actively participating with thorough knowledge of the activities and the purpose of the activities. When one participates with thorough knowledge and the purpose of the activities, it must be said that he was in agreement with others and was also willing to take efforts to achieve the purpose.

17. Since the learned APP opened her arguments, by saying that this is a case of a conspiracy for waging war against the Government, we have referred to sections applied in the charge-sheet, the details of which are furnished in the written submission Exhibit A, under the head "IV-Sections apply". The list indicates application of various provisions of Prevention of Damage of Public Property Act, 1984, Explosives Substances Act, Explosives Act and various provisions of

Indian Penal Code and POTA. The list includes section 120-B, 121-A and 122 of IPC, as also sections 3,4,5 and 20 of POTA. Section 121-A IPC reads as follows;-

" **Section 121-A.** Whoever, within or without India conspires to commit any of the offences punishable by Section 121, or conspires to overawe, by means of criminal force or the show of criminal force, the Central Government or any State Government, shall be punished with imprisonment for life, or with imprisonment of either description which may extend to ten years, and shall also be liable to fine. "

. By explanation to section 121-A, in order to constitute conspiracy under the said provision, it is not necessary that any act, or illegal omission should take place in pursuance thereof. Section 121 within its sweep makes the action of waging war, attempt to wage a or abetment to wage such war punishable with death or life imprisonment, as also unlimited fine.

. Section 3(1)(a) of POTA reads as follows;-

" **3. Punishment for terrorists acts-(1)-**

Whoever -

(a) With intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or **firearms or other lethal weapons** or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature or by any other means whatsoever, **in such a manner as to cause, or likely to cause, death of, or injuries to any person or persons or loss of, or damage to, or destruction of, property** or disruption of any supplies or services essential to the life of the community or causes damage or destruction of any property or equipment used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies, or detains any person and threatens to kill or injure such person in order to compel the Government or any other person to

do or abstain from doing any act;" (**emphasis added**)

. On reference to section 2(g), it can be seen that the activities as comprised in Section 3(1)(a), as also (b) are defined as '**terrorist act**'.

. Intentions of the activities of the training centre, of which accused No.1 Saquib is said to be mastermind by the prosecution, are evident from the subjects those were being discussed by him with some of the deponents. The preparation of Muslim youths by pumping hatred towards non-muslims can certainly be said to be a threat to the unity and integrity of various communities in our secular nation. Punishment prescribed, as can be seen from sub-section 2(a), is death, or imprisonment for life and unlimited fine.

. The expression "**waging war**" has neither been defined in the Penal Code, nor in the General Clauses Act, 1987 and, therefore, it is required to be understood in its ordinary dictionary meaning of "carrying on war." Section 121 of the Penal Code

embraces both descriptions of war, whether by insurrection or invasion. Insurrection is a violent uprising against the authority. The purpose of conspiracy in question appears to be to unsettle the social order by actions, such as, explosions at various places and assassinations of the Hindu leaders. It may not be an exaggeration to say that, the same is tantamount to guerilla war against the State. Explosions at crowded places, merely because only 3 have taken place, cannot be looked at in isolation. By the nature of the act itself, those can be seen to be peculiar conduct not attracting ordinary routine penal provisions. The courts, while looking to such incidents, also cannot be unmindful of the present conspiracy being a part of larger plan. Otherwise, there is no necessity to run a training centre and identify the suitable youths to be trained. The suggestion of requirement for considering magnitude of the conspiracy beyond three bomb blasts, may appear to be consideration of irrelevant material by the courts, to the persons dealing with the conventional criminal matters. But, the courts must keep in pace with unconventional trend of the offences, with which the courts and State are required to deal with, since recent past.

18. For the purpose, we may usefully refer to Section 57, and more particularly sub-section (11), of Indian Evidence Act, which reads thus;

" 57. Facts of which Court must take judicial notice.-

(11). The commencement, continuance, and termination of hostilities between the Government of India and any other State, or body of persons;"

. In the matter of MDK Imigration Consultant, Chandigarh v/s Union of India, 2002 Cr.L.J. 252 ((P&H), it was held;

" Court may take judicial notice of widespread malaise of illegal immigration and the exploitation of young ones by unauthorised recruiting agents."

. No doubt, there is no official declaration of war against the neighbour, where the confessing accused was trained, but sub-section (11) of Section 57 of the

Evidence Act, desires the court to take a judicial notice of hostilities between the Government of India and any other State or body of persons. With the passage of time, the courts ought to take judicial notice of commencement and continuance of hostilities, which are at par with guerilla war. We feel that, in the light of section 57(11), the Court would be in a position to take judicial notice of continuance of hostilities, although apparently unconnected with the hostilities specifically referred in the chargesheet.

. Viewing the situation to the extent permissible by virtue of sub-section (11) of Section 57 of Indian Evidence Act, the submission of learned APP that ultimate object of the conspiracy is to wage war, against the State, does not appear to be exaggeration.

19. On the basis of discussion of the statements of witnesses, as recorded under Sections 164 or 161 of the Cr.P.C., we have arrived at a prima facie conclusion that the present appellant was participating in the activities of the conspiracy in question with knowledge about its activities and, therefore, can be presumed to be in agreement with other conspirators. The offence is punishable with at least imprisonment for life and,

therefore, the application for bail, irrespective of the fact, whether the same is to be considered in the light of section 49 of POTA, or only under general provisions of Section 439 of Cr.P.C., will have to be rejected.

. An affidavit is filed by Shri Nagesh Lohar, Senior Inspector of Police attached to DCB, CID, Crime Branch, Unit-VI, Mumbai, dated 18th January, 2006,

through APP, which is taken on record and marked Exhibit B for the purpose of identification. In paragraph 8 of the said affidavit, it is affirmed that, the appellant is involved in one more Crime (CR.No.I-25/2003), registered with Padgha Police Station, for offences punishable under Sections 143, 147, 149, 225, 341, 353, 335. It is alleged that, the appellant, along with other villagers, surrounded accused No. 1 Saquib when the police had been to Padgha to apprehend Saquib and slogans of "Allah-ho-Akbar" were raised. Consequently, accused Saquib could escape. Nature of this offence would be one more obstacle in considering the bail plea of the appellant, favourably. This is because, the appellant-accused has already shown inclination to hamper the course of justice.

20. The learned counsel for the appellant has taken us through the discussion by the Hon'ble Supreme Court, regarding case of accused No.1 Shaukat in the matter of State (NCT Delhi) vs. Navjot Sandhu, 2005 AIR SCW 4148, and more particularly the observations at pages 4299 to 4307 of the same. The Hon'ble Apex Court, in this referred part of the judgment, has discussed the circumstances relied upon by the prosecution for its case, as against accused Shaukat Hussain. The learned Counsel laid emphasis upon the conclusions at page 4307. The Apex Court held;

" We find that there is no sufficient evidence to hold him guilty of criminal conspiracy to attack the Parliament. The gaps are many, once the confession is excluded."

" These circumstances, without anything more, do not lead to conclusion that Shaukat was also a party to the conspiracy in association with deceased terrorists."

. We have our own reservations as to whether the observations of the Apex Court, as tried to be utilised by the learned Counsel for the appellant, can be so

used. It was the contention of the learned Counsel that the circumstances relied upon by the prosecution against Shaukat in the reported case were much more stronger than the circumstances relied upon by the prosecution against the present appellant. As rightly argued by learned APP, those observations of the Hon'ble Supreme Court were the observations at the conclusion of the trial, when the court had benefit of testing veracity of the witnesses, in the light of their cross-examination. In any case, it is mainly a finding of fact, because the conclusion, whether the circumstances together led to an inference that the accused was a party to the conspiracy by agreement, is based upon an attempt to draw possible inference regarding existence of complicity of the accused, on the basis of evidence regarding conduct of the accused relied upon by the prosecution and held proved.

. We must remind ourselves that the conspiracies get hatached in secrecy. For an agreement for conspiracy between the two co-accused, there cannot be any direct evidence, except the statement of either accused (and confessional statement of co-accused under Section 32 of POTA is held to be inadmissible, even after considering the support of Sections 10 and 30 of

the Evidence Act.). Viewed thus, agreement, like motive, is a thing to be felt, rather than perceived and which is locked in the inner compartment of the brain of the accused persons. It will have to be inferred by circumstantial evidence regarding incidents of conduct and participation of the accused, to the cause of the conspiracy. Therefore, although the question, whether a particular accused is a co-conspirator, having agreed to act in furtherance of the ultimate object of the conspiracy, to be answered on the basis of circumstantial evidence, appears to be a mixed question of law and fact, the conclusion ought to be based upon the finding of fact. The question that Shaukat could not be said to be a member of conspiracy to attack the parliament, based on circumstantial evidence regarding his conduct, is mainly a finding of fact and, therefore, cannot have binding effect on this court, as ratio laid down by the Hon'ble Apex Court. The finding of fact must be arrived at, by reference to the facts on record in each particular case and the value of the evidence laid by the parties to establish those. There cannot be any yardstick for the purpose, and conclusions drawn in a given case cannot provide any support to draw conclusions in another case.

. The learned APP drew our attention to the result of Navjot's case, in paragraph 22. She was emphatic of the fact that, although Shaukat was held to be not a member of conspiracy, on the basis of material in that case, he is convicted for offence under Section 123 IPC and sentenced to rigorous imprisonment for ten years, fine Rs.25,000/=, in default, further rigorous imprisonment for one year.

. In the matter at hands, we feel that although the circumstances relied upon are few, those are much stronger than the circumstances against Shaukat in the reported case. There is evidence to show that the present appellant had occasions to hear thoughts expressed by alleged mastermind-accused No. 1 Saquib. The occasion of his reaching the trainees to Mahuli hill, is not isolated occasion of a hired taxi. On the contrary, there is reason to believe that his services were being used for all types of transports for the needs of training centre. At this prima facie stage, therefore, we fee the material to be sufficient to infer knowledge, intention and agreement.

21. The case of Nalini (State through Superintendent of Police CBI/SIT Vs. Nalini and others, (1999) 5

S.C.C. 253), was also relied upon by the learned counsel for the appellant for advancing the same argument, as advanced on the basis of Navjot's case discussed in above paragraph. Referring to paragraph 610 in the matter of Nalini, learned Counsel again pointed out that the circumstances relied upon therein, were much stronger, and yet accused Nos.16 and 17, namely, Ravi and Suseendran, could not be held to be members of conspiracy, without more material.

. Our reasons for rejection of similar contention of the learned Counsel based on Navjot's case, shall also be the reasons for similar argument based on

Nalini's case. Even in Nalini's case, accused was ultimately sentenced to life imprisonment, and taking a cue from this argument of learned APP, we must say that mere absence of proof, as against appellant herein, of his being member of conspiracy, is not necessarily sufficient for his total acquittal. In view of non-applicability of subsections (6) and (7) of Section 49 of POTA, although the appellant is not obliged to demonstrate that there are grounds for believing that he is not guilty of committing alleged offence, while considering bail plea under general provisions,

existence of prima ^[64]facie case against the appellant-accused, of serious charge would be the first obstacle in the path of favourable consideration.

. Otherwise also, conspiracy in Nalini's case (supra), targeted only single individual, although a VVIP. The conspiracy under consideration must be reckoned to be more serious due to its larger amplitude.

22. For the reasons discussed hereinabove, we have arrived at a conclusion that prima facie, there are reasons to believe the present appellant to be a member of conspiracy. Even if he is not a member of conspiracy, the material can be considered to examine whether he has committed any other serious offence without being a member of conspiracy. There is also material indicating that the appellant is capable of causing obstruction in the course of justice. Otherwise

also, learned APP has pointed out that the appellant, as well as some of the witnesses, belong to the same village Borivali of Padgha. Taking into account these aspects, we are of a considered view that the bail plea of the appellant cannot be considered, favourably.

23. The appeal is, therefore, dismissed.

Office shall retain following documents with the record of the appeal;-

(i) Exhibit A, captioned as "Submissions on behalf of the Prosecution".

(ii) Exhibit B, affidavit dated 18.1.2006, by Shri Nagesh Lohar, Senior Inspector of Police, and;

(iii) A folder containing copies of Statements of eight witnesses and confessions of two accused persons, which are referred in the judgment.

(V.K.Tahilramani, J.)

(N.V.Dabholkar, J.)

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